82-1065

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CONROCK COMPANY, ET AL.,

Petitioners,

v.

TEXAS PARTNERS and SAN FRANCISCO PARTNERS II,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the absence, from management proxy materials soliciting proxies in favor of so-called "anti-takeover" amendments to corporate articles, of a statement that management's motive in proposing such amendments is a desire to prevent its ouster is a material omission.

2. Whether, as a matter of law, the absence from such proxy materials of discussion of the mere possibility of takeover attempts of the corporation by tender offer is a material omission.

3. Whether, as a matter of law, the absence from such proxy materials of a "general statement" that the present market value of the corporation's real estate assets is substantially greater than their value in terms of historic cost less accumulated depreciation is a material omission.

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

A. Appellees:

1. Conrock Company
2. William Jenkins
3. Thomas M. Linden
4. Robert Mitchell
5. Quentin W. Best
6. Byron P. Weintz
7. Harold H. Short
8. Grover R. Heyler
9. Peter de Wetter
10. William T. Huston
11. California Portland Cement Company

B. Appellants:

1. Texas Partners
2. San Francisco Partners II

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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The petitioners, Conrock Company, William Jenkins, Thomas M. Linden, Robert Mitchell, Quentin W. Best, Byron P. Weintz, Harold H. Short, Grover R. Heyler, Peter de Wetter and William T. Huston, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 30, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, reported at 685 F.2d 1116, and the unreported Order of the district court granting petitioners' motion for summary judgment appear in the Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 30, 1982. Petitioners' timely petition for rehearing and suggestion for rehearing en banc was denied on October 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 14(a) of the Securities Exchange Act of 1934:

> It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to Section 12 of this title.

Rules 14a-3 and 14a-9 of the Securities and Exchange Commission are set forth in the Appendix.

STATEMENT OF THE CASE

In March 1980, petitioner Conrock Co. ("Conrock") distributed a proxy statement prior to that year's annual meeting of Conrock shareholders. It included a proposal by Conrock's board of directors for an amendment (the "supermajority amendment") to Conrock's Certificate of Incorporation which would require a favorable vote of 60% of Conrock's outstanding shares to approve certain kinds of business transactions between Conrock and a Conrock shareholder owning 5% or more of the company's stock. The proxy statement also set forth the intention of the

directors to amend Conrock's bylaws to require that a majority of the board be "outside" directors, that is, persons who are not officers or employees of Conrock and have no material business relationship with Conrock.

Shortly thereafter, in April 1980, respondents, who then owned about 3.7% of Conrock's stock, filed a complaint against Conrock, its directors and California Portland Cement Co. ("CPC"), Conrock's largest shareholder, seeking, among other things, a preliminary injunction to prevent the shareholders from voting on the proposal. The respondents invoked the jurisdiction of the district court on the basis of 15 U.S.C. §§ 77v and 78aa and the doctrine of pendent jurisdiction.

The complaint alleged that the proxy materials contained several material omissions and misstatements. The three principal alleged deficiencies addressed by the Ninth Circuit were: (1) the failure to disclose that the true motive behind the supermajority amendment was the desire of Conrock management to prevent its ouster, either directly or through the purchase of Conrock shares held by CPC; (2) the failure to disclose an offer made in 1979 by Martin Marietta Corporation to a CPC shareholder (not a Conrock shareholder) to buy that shareholder's CPC stock (the "Martin Marietta offer"); and (3) the failure to disclose that the current market value of Conrock's primary real estate assets was substantially greater than its value in terms of historic cost less depreciation as reported in Conrock's public financial statements. The district court denied respondent's motion for a preliminary injunction. At the shareholders' meeting, about 90% of Conrock's shares were voted on the supermajority amendment and it was approved by about 84% of all outstanding shares.

Conrock and the other petitioners then moved for summary judgment. Respondents sought a continuance which

was granted on the condition that discovery be stayed pending the hearing. At the time of the hearing, respondents unsuccessfully sought a further continuance on the ground that they needed discovery to oppose the summary judgment motion. The district court then granted Conrock's summary judgment motion.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed the judgment and remanded the case to the district court. Subsequently, the Ninth Circuit denied a petition for rehearing and suggestion for rehearing en banc.

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit has created conflicts with other Circuits on matters of fundamental and widespread significance in the application of federal securities laws

The Ninth Circuit's opinion discussed the omission of three subjects from the proxy materials: (1) Conrock management's "true purpose" in proposing the supermajority amendment; (2) the Martin Marietta offer; and (3) the undervaluation of Conrock's primary real estate assets. Respondents contended that management's alleged desire to prevent its ouster would be significant to a shareholder considering the supermajority amendment. The Martin Marietta offer and the undervaluation of Conrock's real property were said to be significant in that they demonstrated that Conrock was "a prime candidate for a takeover attempt by means of a tender offer," a "fact" which respondents had alleged was improperly omitted from the proxy materials.

In each instance, the Court of Appeals found that material issues of disputed fact existed and that the district court erred in not affording respondents pretrial discovery.

Discovery, however, is not an end in itself and its absence is not in itself reason to deny summary judgment. The materiality of proxy statement omissions, like any other issue, may be the subject of summary judgment. Under the criterion established by this Court, summary judgment is proper where "reasonable minds cannot differ on the question of materiality." *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 450 (1976); *Mesh* v. *Bennett*, 481 F. Supp. 904, 905 (S.D.N.Y. 1979) (summary judgment for defendants granted). In this case, and under that standard, respondents' discovery would have been a useless formality and was properly avoided.

The Ninth Circuit's misplaced emphasis on discovery, however, is of secondary importance; it is merely a symptom if its subjective approach to the three substantive matters is discussed. It is that approach, and its rejection of the objective standards under which those three matters are routinely regarded as purely questions of law, that are of crucial significance here. This significance derives from two considerations: the frequency with which these three questions must be faced by corporate management and the fundamental conflicts the Ninth Circuit has raised with other federal circuits in evaluating their treatment. Each of the three topics discussed by the Ninth Circuit can constantly arise in the preparation of proxy materials of any corporation. Management cannot solicit proxies without having some subjective motive; management interest in retaining corporate control is near universal. Similarly, any corporation can be subject to characterization as a "takeover target." The subject of asset value is a part of every annual report and can be a necessary element in many proxy materials.

Thus, the need for consistent guidance is clear. Yet the Ninth Circuit's opinion creates substantial conflict where

none previously had existed. Other federal circuits, without exception, have either found unnecessary or have affirmatively condemned as improper the discussion of the very matters as to which the Ninth Circuit found Conrock's proxy materials wanting. The failure to "disclose" management's desire to perpetuate itself or to entrench its control has, because of its obviousness, been uniformly regarded as immaterial as a matter of law. The impropriety of speculation and prediction of market activities, such as takeover attempts, and of general statements of asset valuation have previously been beyond doubt. Left unresolved, the fundamental conflicts the Ninth Circuit has raised will inevitably generate doubt and confusion in areas previously noted for consistent and reliable judicial guidance.

B. Failure to discuss management motive and intent in proxy materials is not an actionable omission as a matter of law

Respondents contended in the district court and on appeal that Conrock management's primary concern in proposing the supermajority amendment was the prevention of its ouster from management either directly or as a result of a purchase of CPC's interest in Conrock. The proxy materials did not "disclose" this motive and the district court agreed that its omission was not actionable. Although the proxy statement did not discuss this motive, it did plainly describe the effects that the proposed amendment could have on changes in Conrock management. Specifically, it stated that

> [i]t should be noted, however, that a request by an outsider for approval of a transaction . . . could pose a conflict-of-interest situation for at least some members of the Board of Directors, who could be confronted with the prospect of losing their positions on the Board of Directors and/or as officers of the Company if the

> transaction were consummated, even though the terms of the transaction were very favorable to the Company's shareholders.

It further explained that the supermajority amendment

> may also have the effect of maintaining the continuity of the Company's incumbent management and may make changes in management brought about through a merger, consolidation or sale more difficult, even if a majority of shareholders might consider such changes advisable. Thus, the over-all effect of [the supermajority amendment] may be to render more difficult or to discourage a merger or tender offer, the assumption of control by a holder of a large block of the Company's shares and the removal of incumbent management.

Thus, the proxy statement disclosed in plain terms the effect of perpetuating management control. The Ninth Circuit is squarely in conflict with other circuits which hold that so long as the objective *effect* of preserving corporate control is disclosed, a further "disclosure" of management's subjective *desire* to preserve corporate control is not necessary and that, as a matter of law, the absence of such a disclosure is not an actionable omission. Courts have repeatedly held that management's wish to "prevent its ouster" need not be stated because it is so obvious.

Due to the similarity of purpose of the applicable statutes and regulations, such reasoning has been applied in cases involving proxy statement disclosures, tender offer disclosures and in Rule 10b-5 cases. *Golub* v. *PPD Corp.*, 576 F.2d 759, 764 (8th Cir. 1978); *Bertoglio* v. *Texas International Co.*, 488 F. Supp. 630, 650-51 (D. Del. 1980).

In *Rodman* v. *Grant Foundation*, 608 F.2d 64 (2d Cir. 1979), plaintiff attacked certain stock purchase programs for which management had solicited proxies. The plaintiff asserted that management's " 'desire to entrench their con-

trol was the principal, if not the sole reason for the . . . stock purchase program' and that this was not disclosed to the shareholders." *Id.* at 70. The district court granted summary judgment to the defendants, stating that

> corporate control is recognized to be of universal interest to corporate officers and directors and . . . the failure of proxy materials to disclose this subjective interest is not a violation of the securities laws.

Id. at 71. The Second Circuit affirmed.

In *Golub* v. *PPD Corp.*, 576 F.2d 759 (8th Cir. 1978), management of the defendant corporation ("Old PPD") issued a proxy statement in favor of a sale of Old PPD's assets to another corporation ("New PPD"). The sale agreement contemplated that New PPD was to continue the business of Old PPD without interruption and provided that if Old PPD's management would remain in the employ of New PPD and if its operations exceeded certain profitability targets, then management would receive a bonus. Plaintiffs alleged that the proxy statement omitted management's true motive and should have stated that the bonus was actually a premium for the sale of corporate control. The district court granted summary judgment to the defendants and the Court of Appeals affirmed, stating that

> [a]ctually, the plaintiffs are not complaining about the absence of facts in the proxy statement. Their complaint is that those who prepared the statement did not "disclose" what plaintiffs say was the motivation of Old PPD's management in selling the assets of the company, and did not characterize the bonus aspect of the transaction as plaintiffs would have it characterized. Under the Act and regulations plaintiffs were not entitled to have such a "disclosure" or such a characterization.

Id. at 765. *See Biesenbach* v. *Guenther*, 588 F.2d 400, 402 (3d Cir. 1978) (dismissal of complaint affirmed; failure to

disclose "true purpose" of transactions does not state a claim under Rule 10b-5); *Gluck* v. *Agemian*, 495 F. Supp. 1209, 1214 (S.D.N.Y. 1980) (summary judgment for defendants; Rule 10-5 does not require disclosure of subjective motive); *Bucher* v. *Shumway*, [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,142 at 96,303 (S.D.N.Y. 1979), *aff'd*, 622 F.2d 572 (2d Cir. 1980), *cert. denied*, 449 U.S. 841 (1980) (complaint dismissed; tender offerors need not disclose that "true purpose" of transaction is to consolidate management control).

The Ninth Circuit implied that the present case is somehow distinguishable from this uncontradicted authority and that discovery was required concerning the "relationship" between Conrock and CPC. Its opinion points out that one effect of the supermajority amendment might also be to make CPC less vulnerable to takeover because a potential acquirer of Conrock might do so through acquisition of CPC. If the acquirer lost interest in Conrock due to the supermajority amendment, it would therefore also lose interest in acquiring CPC. The court concluded that the "closeness" of the relation of CPC and Conrock was somehow relevant to this issue. If, as a matter of law, however, management need not disclose the desire to "entrench" itself, then the means of entrenchment is unimportant. What is required is disclosure of the facts concerning the proposal that would have the effect of entrenchment. As the court conceded, the proxy materials properly disclosed the necessary facts: that control of Conrock could be obtained through CPC, and that the proposal would impede such an approach.

C. Speculation as to future market activities in proxy materials is prohibited as a matter of law

In the district court, respondents offered evidence that in 1979 Martin Marietta Corporation offered to buy the CPC

shares held by CPC's largest shareholder. That offer was rejected. No tender offer had been made for Conrock shares and management had not been approached concerning a possible acquisition of Conrock by a third party. These facts were not disputed. Respondents, however, did not allege that the Martin Marietta offer should itself have been mentioned in Conrock's proxy materials, nor did they make such an assertion before the Court of Appeals. Rather, they alleged that the proxy materials should have stated that Conrock "is a prime candidate for a takeover attempt by means of a tender offer." They pointed to the Martin Marietta offer merely as evidence of this candidacy: "it demonstrated the probability that Conrock itself would be the subject of takeover attempts." They neither alleged nor argued that any "takeover attempt by means of a tender offer" for Conrock stock was pending or that such an attempt had ever been made. Thus, it is the "omission" of generalized conjecture concerning Conrock as a tender offer target that respondents placed in issue and not any failure to refer to an offer for CPC stock made to and rejected by a CPC shareholder in the year prior to the distribution of the Conrock proxy materials. The Ninth Circuit created this issue itself and concluded, erroneously, that discovery concerning the circumstances of the rejected offer was required.

The impropriety of indulging in subjective speculation in proxy materials has been uniformly recognized. It is a natural consequence of the securities laws' emphasis on the disclosure of facts. In *Bertoglio* v. *Texas International Co.*, 488 F. Supp. 630 (D. Del. 1980), for example, where the plaintiffs alleged that a proxy statement should have stated that a corporation was "an obvious target for an unfriendly takeover attempt. . . ," *id.* at 640, the court, rejecting this contention, pointed out that

> [t]he actual emergence of a tender offer, the price of such an offer, and the reactions of fellow shareholders

> and the presence or absence of alternative offerors are nothing more than speculation. Section 14(a) of the Act and Rule 14a-9 do not require, *and in fact do not condone*, speculation and predictions by proxy solicitors as to future market activities.

Id. at 641 (emphasis added). *See also Bucher* v. *Shumway*, [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,142 (S.D.N.Y. 1979), *aff'd*, 622 F.2d 572 (2d Cir. 1980), *cert. denied*, 449 U.S. 841 (1980).

The issue before the district court was whether, *as a matter of law*, conjecture as to a corporation's status as a tender offer target is properly included in proxy materials. This issue was plainly appropriate for summary judgment. It is equally plain that such speculation may not, as a matter of law, be injected into proxy statements.

Even if respondents had argued that the absence of the Martin Marietta offer was itself an actionable omission, the same conclusion would be reached. The Martin Marietta offer was not a firm offer for Conrock shares. It was not even an offer to a Conrock shareholder. It was instead an offer to a shareholder of a shareholder of Conrock. Respondents themselves admit that this information has significance in only one respect: it demonstrates "the probability that Conrock itself would be the subject of takeover attempts." Management, however, "is not required to set before shareholders information only suggestive of mere possibility." *Bertoglio* v. *Texas International Co.*, *supra*, 488 F. Supp. at 641. Indeed, to have inferred from such a remote occurrence that Conrock, at some time in the future, would be the subject of takeover attempts by unknown offerors would be the very speculation that the securities laws do not condone.

D. A "general statement" of undervaluation is impermissible in proxy materials

The final proxy material deficiency discussed by the Court of Appeals is the failure to disclose that Conrock's "primary real estate assets were substantially undervalued." Conrock has always conceded that the market value of its real estate assets exceeds the value (properly based on historical cost less depreciation) set forth in its financial statements. Thus, there were no disputed issues of fact on this point. The question put before the district court by the summary judgment motion was whether failure to disclose such undervaluation was an actionable omission as a matter of law. In dealing with this question, the Ninth Circuit ignored significant facts and settled SEC policy and raised irreconcilable conflicts with other Circuits.

Courts and the SEC have historically not required management appraisals of value of corporate assets in proxy statements due to their inherently uncertain and speculative nature. That policy has been expressly applied, not merely to formal asset appraisals, but informal estimates as well. It is not limited to cases, such as the one now before this Court, in which the importance of asset market value is altogether hypothetical. It is applied even in instances where corporate assets are presently being systematically liquidated, and their market value is far more important than in the present case.

Gerstle v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281 (2d Cir. 1973), is the leading case on this issue. In the *Gerstle* case, General Outdoor Advertising Co. ("General") had distributed a proxy statement in connection with a merger into Gamble-Skogmo, Inc. ("Skogmo"), its majority shareholder. Prior to the proposed merger, and under Skogmo's influence, 23 of General's 36 plants had been sold off at prices well in excess of their book values, and management

had developed projections indicating that the remaining plants could be disposed of with similar results. General's proxy statement discussed the past sales and mentioned the possibility of additional sales in the future. However, the proxy statement did not explain that Skogmo intended to sell all of the remaining plants and did not disclose their appraised values. Instead, the remaining plants were shown as carried at cost less depreciation.

While the Second Circuit upheld the trial court's conclusion that the failure to disclose that Skogmo "intended to pursue aggressively the policy of selling General's plants" was a material omission, *id.* at 1295, it held that, even in the presence of such a specific and ongoing program, reference to asset appraisals would have been improper and that failure to refer to them in the proxy statement was not an actionable omission. The court pointed out that the long-standing position of the SEC itself, as stated in an amicus brief filed with the court, was that

> in financial statements filed with the Commission, fixed assets should be carried at historical cost (less any depreciation) in the absence of any statute, rule, or *specific* Commission authorization to the contrary.

Id. at 1291 (emphasis added). The SEC further stated that it has

> traditionally looked with suspicion upon the inclusion of asset appraisals even in the text or narrative portion of proxy statements. It has been our experience that such appraisals are often unfounded or unreliable.

Id. at 1293. As the court noted,

> [t]he Commission's policy against disclosure of asset appraisals in proxy statements has apparently stemmed from its deep distrust of their reliability, its concern that investors would accord such appraisals in a proxy statement more weight than would be warranted, and

> the impracticability, with its limited staff, of examining appraisals on a case-by-case basis to determine their reliability.

Id. at 1294. Additionally, the court observed that

> [i]t has long been an article of faith among lawyers specializing in the securities field that appraisals of assets could not be included in a proxy statement.

Id. at 1293.

The *Gerstle* case makes it unmistakably clear that appraisals of the market value of corporate assets, because of their inherent lack of reliability, are not required in proxy materials, even when issued in the midst of a defined program of asset sales where the value of the assets involved is crucial. It cannot be suggested, in the face of such a policy, that management may nonetheless announce that fixed assets are "substantially undervalued," and that such a statement would be appropriate because it is not an appraisal. Such a statement is at best the distillation of an appraisal. It would suffer from all the defects which make appraisals suspect and, if anything, would be more objectionable than an actual appraisal because of its cryptic nature and lack of factual support.

Summary judgment in reliance on *Gerstle* is not exceptional. *Christopher* v. *Time Inc.*, [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,056 (S.D.N.Y. 1975) (summary judgment for defendants granted; it was proper and legally sufficient to value timberlands at cost less depletion, rather than at fair market value, even though proxies were being solicited for an actual merger); *Madonick* v. *Denison Mines Ltd.*, [1973-1974 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,550 (S.D.N.Y. 1974) (summary judgment for defendants granted; it was proper to exclude discussion of mining and milling asset valuations in a proxy solicitation regarding an amalgamation of corporations);

Gerrity v. *Chapin*, [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,241 at 96,717 (S.D.N.Y. 1980) (summary judgment for defendants granted; disclosure that actual value of assets is substantially in excess of book value is not required in proxy materials issued in connection with a proposed stock issuance).

The Ninth Circuit's attempt to distinguish this policy of nondisclosure has two serious flaws. First, the court somehow concluded that the Conrock proxy materials were the first stage of a continuing proxy contest. Thus, it was able to state that the *Gertsle* case did "not . . . foreclose at this stage respondents' argument that at some point in the proxy contest a statement that the assets were substantially undervalued should have been disclosed." 685 F.2d at 1121. There was, however, no proxy contest. There was no future point at which further disclosures would be made. The issue was therefore not whether there might have been some time in the future when disclosure would have become necessary or appropriate, but whether, in the specific proxy materials distributed in March 1980, a "general statement" concerning asset valuation was required.

Second, and more important, the Court of Appeals held *Gerstle* and the policy it represents inapplicable because respondents were not contending that Conrock should have disclosed an estimate of value or an estimate of the amount of undervaluation; instead, they were merely contending that a "general statement of undervaluation" should have been included. *Gerstle*, concluded the court, only prohibits asset appraisals, not "general statements." *Id.* at 1121. This conclusion is not only in conflict with other circuits, but, by ignoring the reasons for the policy, largely undermines it. If discussions of asset valuations, estimates of value and estimates of undervaluation are to be avoided for their inherent unreliability and potential to mislead, then surely

"general statements" on the same subject cannot be less objectionable. In effect, the Ninth Circuit has concluded that proxy solicitors must take material conceded to be unreliable and potentially misleading, make it sufficiently vague, remove any factual support it may have, and then "disclose" it. The need to resolve the dilemma such reasoning creates provides reason in itself to grant this petition.

CONCLUSION

The Ninth Circuit's opinion has cast considerable doubt on three unambiguous, and previously unquestioned, guidelines for the preparation of proxy materials. It has deprived proxy solicitors of any assurance that a description of the objective effects of a proposal favoring incumbent management will be sufficient if not accompanied by a confession of subjective motivation. Likewise, it is now unclear whether speculation in proxy materials on the chances of a tender offer will be condemned or, on the basis of some remote event such as an offer to a shareholder's shareholder, will be required. Finally, persons preparing proxy materials are now confronted with two entirely inconsistent standards for the treatment of asset valuation. For the reasons stated herein, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit in this action.

Dated: December , 1982

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CONROCK COMPANY, WILLIAM JENKINS, THOMAS M. LINDEN, ROBERT MITCHELL, QUENTIN W. BEST, BYRON P. WEINTZ, HAROLD H. SHORT, GROVER R. HEYLER, PETER DE WETTER and WILLIAM T. HUSTON

No. 80-5764.

UNITED STATES COURT OF APPEALS,

NINTH CIRCUIT.

TEXAS PARTNERS, etc., et al.,

Plaintiffs-Appellants,

v.

CONROCK CO., etc., et al.,

Defendants-Appellees.

Argued and Submitted Jan. 8, 1982.
Decided Aug. 30, 1982.

Appeal from the United States District Court for the Central District of California.

Before CHAMBERS, KENNEDY and SCHROEDER, Circuit Judges.

KENNEDY, Circuit Judge:

Appellee Conrock Co. is a Delaware Corporation engaged primarily in extracting, processing, and selling rock, sand, and gravel in aggregate form or, with a mixture of cement, as ready-mixed concrete. Appellee California Portland Cement Co. ("CPC"), a cement manufacturer, owns approximately 33.5 percent of Conrock's stock and sells cement to Conrock. In March 1980, Conrock mailed its shareholders a proxy statement in connection with its April annual meeting. The proxy statement described two anti-takeover amendments to Conrock's Certificate of Incorporation and bylaws to be proposed for shareholder approval at the annual meeting.

The amendment to the Certificate requires the affirmative vote of the holders of at least 60 percent of the outstanding shares of the Company to approve certain business combinations, namely mergers, reorganizations, consolidations,

and sales or leases of assets, with "related persons," defined as those persons or entities owning, directly or indirectly, 5 percent or more of the Company's stock. Further, the 60 percent vote must include the affirmative vote of at least 50 percent of the voting shares held by shareholders other than the related person. The amendment cannot be modified or repealed without the vote of more than 60 percent of the shares. The amendment to the Company's bylaws, related to the first anti-takeover proposal, requires a majority of the directors to be outside directors, that is, persons not employed by the corporation or by a related person and not having direct or indirect material business relationships with the Company. At the annual meeting in April 1980, the two proposals were approved by approximately 84 percent of the outstanding shares of the Company, with a little more than 90 percent of the shares voting.

Appellant Texas Partners, a Texas limited partnership, and appellant San Francisco Partners II, a California limited partnership, together owned 3.7 percent of Conrock's outstanding stock. In early April, prior to the annual meeting, appellants brought a suit against Conrock, CPC, and Conrock's directors, claiming the proxy solicitation violated section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78n(a) (1976),[1] and Rules 14a-3 and 14a-9, 17

[1] Section 14(a) of the 1934 Act provides:

> It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78*l* of this title.

15 U.S.C. § 78n(a) (1976).

C.F.R. §§ 240.14a-3, 240.14a-9 (1981),[2] because it contained false and misleading statements of material fact and omitted material facts necessary to make the statements not misleading. The complaint also alleged breach of fiduciary duty under state common law. Appellants sought a preliminary injunction to halt Conrock's scheduled annual meeting, and permanent relief. After a hearing the district court denied the preliminary injunction. Conrock and CPC then moved for summary judgment, and the district court stayed all discovery until the hearing on and submission of the summary judgment motion. Judge Real granted appellees' motion for summary judgment and adopted findings of fact and conclusions of law submitted by appellees, finding that there were no genuine issues of fact in dispute, and that the proxy solicitation contained no material misstatements and omitted no material information. We find that the district court erred in foreclosing discovery prior to presentation of the summary judgment motion, and that material issues of disputed fact exist that preclude summary judgment at this stage.

We address the three principal alleged deficiencies in the proxy materials issued by Conrock. Appellants contend first

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[2] Rule 14a-3 specifies the information to be furnished to stockholders in connection with any solicitation. Under Rule 14a-9(a):

> No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communciation, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

17 C.F.R. § 240.14a-9 (1981).

that the amendment to the Certificate was intended primarily to prevent the ouster of Conrock's management either directly or through the purchase of CPC's interest in Conrock. Appellants claim the interest of CPC in Conrock was more than passive, and that the amendment was intended to insulate both Conrock's management and that of CPC. Second, and relatedly, appellants challenge the failure to disclose an earlier offer by Martin-Marietta Corporation to purchase the largest share of CPC's stock. Third, appellants attack Conrock's failure to disclose that its primary real estate assets were substantially undervalued, which enhanced Conrock's attractiveness as a takeover candidate and possibly could have provided a substantial premium to Conrock's shareholders in the event of a takeover.

The district court erred in granting summary judgment for appellees without affording plaintiffs-appellants the opportunity to proceed with discovery. Although Rule 56(e) of the Federal Rules of Civil Procedure permits and does not mandate general discovery before the granting of summary judgment,[3] when the issues are complicated or motives and intent are important, "[p]utting plaintiffs to the test . . . without ample opportunity for discovery is particularly disfavored." *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597, 602 (9th Cir. 1976). Appellants should be afforded reasonable access to potentially favorable information prior to the granting of summary judgment, *see Quinn* v. *Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980), because on summary judgment all inferences to be drawn from the underlying facts must

[3] Rule 56(e) sets out the requirements for affidavits submitted in connection with a summary judgment motion, and provides that "[t]he court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." Fed.R.Civ.P. 56(e).

be viewed in the light most favorable to the party opposing the summary judgment motion, *Heiniger* v. *City of Phoenix*, 625 F.2d 842, 843 (9th Cir. 1980); *see Parrish* v. *Board of Commissioners of the Alabama State Bar*, 533 F.2d 942, 949 (5th Cir. 1976). In *Zell* v. *Intercapital Income Securities, Inc.*, 675 F.2d 1041 (9th Cir. 1982), we recently reversed a grant of summary judgment in a suit challenging proxy statement disclosures and found that granting summary judgment without permitting reasonable discovery was premature, because the challenged information was not so unimportant as to be immaterial as a matter of law.

Drawing all inferences in favor of appellants, we find that appellants have established triable issues of material fact, at least in this stage of discovery. The amendment to Conrock's Certificate of Incorporation can be characterized as an anti-takeover device because, as the proxy statement disclosed, it might discourage unrelated persons from making a tender offer for Conrock's shares. A tender offer often is only the first part of a plan to acquire completely the target company, with the second stage being a merger of the two companies in which remaining minority shareholders are purchased or "frozen out" of the new subsidiary. *See* Gilson, *The Case Against Shark Repellent Amendments: Structural Limitations on the Enabling Concept*, 34 Stan.L.Rev. 775, 783 (1982); Brudney & Chirelstein, *A Restatement of Corporate Freezeouts*, 87 Yale L.J. 1354, 1359-61 (1978). As Brudney and Chirelstein suggest, the two-step takeover in the form of a tender offer followed by a merger is analogous to a merger with or a unitary purchase of assets by an unrelated company which is approved by a majority of the company's shareholders. 87 Yale L.J. at 1361-65. Conrock's proposed requirement that a merger or other combination with a related person be approved by at least 60 percent of the outstanding shares and at least 50 percent

of the outstanding shares held by persons other than the related person would make the second step of such a tender offer acquisition more difficult. A second-step acquisition without the consent of Conrock's management would be especially difficult because the proposal requires the vote of 60 percent of all shares, not just those voting, and because Conrock's directors and officers owned between 11 percent and 13 percent of the shares.[4] *See* Gilson, *supra*, 34 Stan. L.Rev. at 783-85. The super-majority provision would not apply if the Board unanimously approved the combination prior to the person's acquisition of 5 percent or more of Conrock's stock.

In addition to impeding tender offer takeover attempts and insulating current management, the super-majority amendment here also would have insulated CPC's management. CPC is Conrock's largest shareholder, owning 34 percent of the stock. A potential acquirer might have sought to acquire or gain control of CPC in order to obtain a substantial portion of the majority stock needed for a first-step tender offer or simply to exercise its control of Conrock's Board and thereby design a merger. By deterring combinations of Conrock with related persons, the amendment deterred the acquisition of CPC. The amendment to Conrock's bylaws requiring a majority of outside directors also would inhibit takeovers by preventing a purchaser of a large block of Conrock's shares, through a tender offer or acquisition of CPC, from acquiring control of Conrock's Board of Directors.

Conrock's proxy solicitation contained certain disclosures revealing the anti-takeover character of the two

[4] The proxy statement reports two different figures for the amount of shares held by Conrock's officers and directors, 13.2 percent and 11.4 percent. Though appellants questioned this, it does not appear that appellees or the district court explained the discrepancy.

amendments. The proxy statement admitted that the super-majority requirement might discourage unrelated parties from making a tender offer, or might make such an offer more expensive, thereby lowering the offer price to shareholders. Shareholders also were informed that the amendment would make the removal of incumbent management more difficult and that a request by an outsider for Board approval of a transaction prior to becoming a related person could present a conflict of interest for Board members. Appellants contend the proxy disclosures failed to reveal that the true motive behind the anti-takeover proposals was the desire of both Conrock and CPC to prevent the ouster of Conrock's management either directly or as a result of the purchase of CPC's interest in Conrock. Appellants refute the district court's finding and appellees' characterization of CPC's investment in Conrock as passive and claim the true relationship between the companies was one of self-dealing. The super-majority proposal could have deterred takeover attempts of both Conrock *and* CPC. The closeness of the relation between Conrock and the management of CPC might have been material to shareholders voting on the amendment. *Cf. Bell* v. *Cameron Meadows Land Co.*, 669 F.2d 1278, 1282 (9th Cir. 1982) (summary judgment for defendants in suit challenging proxy statement inappropriate where material issue of fact existed as to relationship between tender offeror and target company management). The district court erred in foreclosing discovery concerning this relation.

Appellants also challenge the failure to disclose the fact that in 1979, the year before the proxy proposal, Martin-Marietta Corporation offered to buy the stock of CPC's largest shareholder. On appeal appellees apparently admit that such an offer was made. The proxy statement did not address any such past activity, saying only that

"the Board is not aware of any indirect effect, pending or threatened, to attempt to take over control of the Company by acquiring control of California Portland." The factual circumstances surrounding the offer by Martin-Marietta must be examined in further proceedings. If it was a firm offer made with the purpose of acquiring control of Conrock, or if control of CPC would present a significant continuing threat to the control of Conrock, perhaps inherent in the ownership of Conrock's supplier and major shareholder, then the offer might have been material to a vote on the anti-takeover proposals and might have warranted disclosure in the proxy statement. *See South Coast Services Corp.* v. *Santa Ana Valley Irrigation Co.*, 669 F.2d 1265, 1273 (9th Cir. 1982). The Martin-Marietta offer also might have been material if it had been a significant stimulant to Conrock's decision to seek the amendments. The proxy solicitation stated that an entity could acquire control of CPC and, having done so, could then seek to accomplish a non-negotiated business combination with Conrock, which might not be in the best interests of Conrock's remaining shareholders. It is at least arguable at this stage that disclosure of the possible acquisition of Conrock through CPC in this context did not adequately disclose the extent to which the anti-takeover proposal insulated CPC. Further, by not disclosing any past firm offers to acquire control of CPC, this statement and the disclaimer of knowledge of pending attempts to acquire CPC could have been incomplete and misleading to shareholders. The issue must await further development.

Finally, appellants have established an issue warranting further discovery and perhaps trial regarding the nondisclosure of the fact that Conrock's assets were greatly undervalued, that is, that their market value greatly exceeded their book value. Appellants allege that Conrock's

real estate was undervalued by approximately $200 million, and that as a real estate-related company with substantially undervalued assets, Conrock was a very attractive takeover target. Appellants contend the proxy statement at least should have included a general statement of the undervaluation of Conrock's real estate because this would have been material to a shareholder voting on proposals that would reduce Conrock's attractiveness as a potential takeover target.

In *South Coast Services Corp.* v. *Santa Ana Valley Irrigation Co., supra,* we held that disclosure of an estimate of the fair market value of a company's assets by the Board of Directors was not required by Rule 14a-9 or section 14(a) because SEC policy then in effect discouraged disclosure of of appraised asset values and because, in any event, the appraisals were neither based on objective, reasonably certain data nor prepared by a qualified expert. 669 F.2d at 1270-73. This does not necessarily foreclose at this stage appellants' argument that at some point in the proxy contest a statement that the assets were substantially undervalued should have been disclosed. Appellants point to new SEC policy as authorizing the inclusion of asset valuations in proxy statements, see SEC Release No. 34-16833, Fed.Sec.L. Rep. (CCH) ¶ 24,117 (May 23, 1980). The release only applies to appraisals made in good faith and on a reasonable basis that are included in proxy materials in contests involving the liquidation of company assets, but it might indicate a relaxing of SEC public formal policy. Importantly, appellants do not appear to contend that Conrock must have disclosed an estimate of the current value of the real estate or an estimate of the amount of overvaluation. Appellees' reliance on cases rejecting disclosure of asset appraisals, *e.g., South Coast Services, supra; Gerstle* v. *Gamble-Skogmo, Inc.,* 478 F.2d 1281 (2d Cir. 1973), is thus

inappropriate. A general statement of undervaluation might have been material to shareholders to inform them of the attractiveness of Conrock as a takeover candidate and the importance of the anti-takeover amendments. We need not address the issue of current SEC policy, and appellants' contention that a general statement of undervaluation should have been disclosed will await further proceedings.

The district court's granting of summary judgment on the above issues without providing discovery was an abuse of discretion and premature. Appellants have demonstrated at this stage the possible existence of genuine issues of material fact, and the disposition of the issues above must await further discovery and perhaps trial.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TEXAS PARTNERS, SAN FRANCISCO PARTNERS II, *Plaintiffs,* v. **CONROCK CO., CALIFORNIA PORTLAND CEMENT CO., ET AL.,** *Defendants.*	**CV 80-1295-R ORDER**

Defendants CONROCK CO., a corporation (hereafter CONROCK), its directors, WILLIAM JENKINS, THOMAS M. LINDEN, ROBERT MITCHELL, QUENTIN W. BEST, BYRON P. WEINTZ, HAROLD H. SHORT, GROVER R. HEYLER, PETER DE WETTER AND WILLIAM T. HOUSTON, together with defendant CALIFORNIA PORTLAND CEMENT CO., a corporation (hereafter CPC) bring on a motion for summary judgment to resolve this lawsuit in their favor.

Plaintiff opposes summary judgment on two grounds— 1. that discovery is needed to resolve genuine issues of material fact and 2. that even absent discovery there is created by the verified complaint and affidavits, facts which must be resolved by trial.

Rule 56(f) Federal Rules of Civil Procedure admonish the Court to permit discovery when "a party opposing the motion . . . cannot for reasons stated present by affidavit facts essential to justify his opposition." Despite the protestations of counsel this motion for summary judgment is not one where discovery will help. The controversy delineated by plaintiffs can be decided and "secure the just,

speedy and inexpensive determination" of this action without discovery of the so called "facts" plaintiffs' claim must be discovered to resolve the disclosure duties of defendants in its proxy materials attendant to a shareholders' meeting asking approval of a super-majority vote (60%) to accomplish approval of certain business combinations.

Plaintiffs' allege eleven (11) omissions or misstatements in the Proxy Statement attendant to the shareholders meeting of April 16, 1980 and the Annual Report—1979 of defendant CONROCK. Resolution of this lawsuit now turns on the determination of the legal effect of five (5) of the alleged omissions or misstatements. They are (1) the undervaluation of CONROCK's property holdings; (2) the location of CONROCK's property holdings; (3) CONROCK's status as a target of a takeover by means of a tender offer; (4) the premium stockholders are generally given in takeover attempts; and (5) the safeguards accorded to CONROCK's stockholders by Delaware law.

Stripped of all of the prolix rhetoric of plaintiffs' this lawsuit can be decided upon the legal requirement of CONROCK to make the disclosures of undervaluation of property, location of property, candidacy for takeover, stockholder expectations in takeover and statements of Delaware law.

A caveat should be stated at the outset—it takes no financial wizardry or mathematical genius to recognize a 60% vote needed for approval of a business combination permits a minority of 40% plus 1 share to block what may be the will and best interest of the majority of stockholders.

1. UNDERVALUATION OF CONROCK'S PROPERTY HOLDING

The essence of plaintiffs' attack on CONROCK's Proxy Statement and Annual Report—1979 is that CONROCK's

holdings are grossly undervalued and that valuation of those holdings is material to a shareholder's decision in accepting or rejecting the proposal for a super-majority vote in approval of certain business combinations. Plaintiffs here ask this Court to engraft upon the securities law something that the SEC has not yet required as a disclosure. I cannot undertake such legislation and the 2nd Circuit in Gerstle v Gamble-Skogmo, Inc., 478 F.2d 1281 (2nd Cir. 1973) agrees.

2. LOCATION OF CONROCK'S PROPERTY HOLDINGS

What the location of CONROCK's property has to do with a requested vote upon a super-majority requirement for approval of certain business combinations escapes me. Except as to the allusion of plaintiffs that the property is located in Southern California and thereby impacts on its value no enlightment as to materiality is given. Even assuming CONROCK's properties are in prime development areas nothing would be added to the common knowledge of the recent insane appreciation in California properties. Anyone attempting to predict for shareholders the location of the next California "land rush" would be inviting endless litigation if the guess did not equal the general insanity of the last 2-3 years.

3. CONROCK'S STATUS AS A TARGET OF A TAKEOVER

The past is history. The present we know. The future is left to God. The securities law requires no more. The omission of an offer to a shareholder's shareholder does not, as a matter of law, seem to me to be material. Eight months ago, Edward Kennedy in the opinion of most political experts was a prime candidate to takeover the office of President of the United States. August 11, 1980 we learned the fallacy of such a prediction.

4. PROVISION FOR SHARES ON TAKEOVER

Obvious mathematics aside a simple reading of the proxy materials indicates that the shareholders were put on notice that a favorable vote to the 60% approval requirement could adversely affect the price of the shares involved in any attempted takeover of CONROCK.

5. STATEMENT OF DELAWARE LAW

CONROCK's Proxy Statement discusses the effect of Delaware law as it impacts upon the vote to be taken in creating a super-majority voting requirement for certain business combinations. No more is required by SEC regulation.

If any material issue of fact of what is or is not in a printed and published proxy statement or annual report requires discovery this Court fails to perceive it. Discovery will not aid the determination of the legal duty of a corporation to disclose to its shareholders material facts required for an intelligent management of their interest in the corporation. When both come together summary judgment accomplishes the aim of Rule 1 of the Federal Rules of Civil Procedure to "secure the just, speedy and inexpensive determination of every action."

The motion for summary judgment is granted.

DATED: August 14, 1980.

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

SEC RULES

Rule 14a-3 Information to be furnished to security holders.

(a) No solicitation subject to this regulation shall be made unless each person solicited is concurrently furnished or has previously been furnished with a written proxy statement containing the information specified in Schedule 14A (§ 240.14a-101) or with a written proxy statement included in a registration statement filed under the Securities Act of 1933 on Form S-15 (§ 239.29) and containing the information specified in such Form.

(b) If the solicitation is made on behalf of the issuer, and relates to an annual meeting of security holders at which directors are to be elected, each proxy statement furnished pursuant to paragraph (a) of this section shall be accompanied or preceded by an annual report to security holders as follows:

(1) The report shall include, for the registrant and its subsidiaries consolidated, audited balance sheets as of the end of each of the two most recent fiscal years and audited statements of income and changes in financial position for each of the three most recent fiscal years prepared in accordance with Regulation S-X (Part 210 of this chapter), except that the provisions of Article 3, other than § 210.3-06(e), shall not apply and only substantial compliance with Articles 6 and 9 is required. Any financial statement schedules or exhibits or separate financial statements which may otherwise be required in filings with the Commission may be omitted. Investment companies registered under the Investment Company Act of 1940 need include financial statements only for the last fiscal year except for statements of changes in net assets which are to be filed for the two most recent fiscal years. If the financial statements of the registrant and its subsidiaries consolidated in the annual report filed or to be filed with the Commission are not re-

quired to be audited, the financial statements required by this paragraph may be unaudited.

NOTE: Information required by § 210.4-10(k)(1) through (4) of Regulation S-X, applicable to oil and gas companies, is to be included as part of the financial statements included in the report. In addition, the oil and gas information required by § 210.4-10(k)(5) through (8) of Regulation S-X, which may be reported as supplemental information accompanying the financial statements, shall be included in the report.

(2) Financial statements and notes thereto shall be presented in roman type at least as large and as legible as 10-point modern type. If necessary for convenient presentation, the financial statements may be in roman type as large and as legible as 8-point modern type. All type shall be leaded at least 2 points.

(3) The report shall contain the supplementary financial information required by item 302 of Regulation S-K (§ 229.302 of this chapter).

(4) The report shall contain information concerning disagreements with accountants on accounting and financial disclosure required by Item 304 of Regulation S-K (§ 229.304 of this chapter).

(5)(i) The report shall contain the selected financial data required by Item 301 of Regulation S-K (§ 229.301 of this chapter).

(ii) The report shall contain management's discussion and analysis of financial condition and results of operations required by Item 303 of Regulation S-K (§ 229.303 of this chapter).

(6) The report shall contain a brief description of the business done by the issuer and its subsidiaries during the most recent fiscal year which will, in the opinion of management, indicate the general nature and scope of the business of the issuer and its subsidiaries.

(7) The report shall contain information relating to the issuer's industry segments, classes of similar products or

services, foreign and domestic operations and export sales required by paragraphs (b), (c)(1)(i) and (d) of Item 101 of Regulation S-K (§ 229.101 of this chapter).

NOTE: Paragraph (b)(11) of this section permits the information required by this paragraph to be set forth in any form deemed suitable by management.

(8) The report shall identify each of the issuer's directors and executive officers, and shall indicate the principal occupation or employment of each such person and the name and principal business of any organization by which such person is employed.

(9) The report shall contain the market price of and dividends on the issuer's common equity and related stock holder matters required by Item 201 of Regulation S-K (§ 229.201 of this chapter).

(10) Management's proxy statement, or the report, shall contain an undertaking in bold face or otherwise reasonably prominent type to provide without charge to each person solicited, on the written request of any such person, a copy of the issuer's annual report on Form 10-K including the financial statements and the financial statement schedules, required to be filed with the Commission pursuant to Rule 13a-1 under the Act for the issuer's most recent fiscal year, and shall indicate the name and address of the person to whom such a written request is to be directed. In the discretion of management, an issuer need not undertake to furnish without charge copies of all exhibits to its Form 10-K provided that the copy of the annual report on Form 10-K furnished without charge to requesting security holders is accompanied by a list briefly describing all the exhibits not contained therein and indicating that the issuer will furnish any exhibit upon the payment of a specified reasonable fee which fee shall be limited to the issuer's reasonable expenses in furnishing such exhibit. If the issuer's annual report to security holders complies with all of the disclosure require-

ments of Form 10-K and is filed with the Commission in satisfaction of its Form 10-K filing requirements, such issuer need not furnish a separate Form 10-K to security holders who receive a copy of such annual report.

NOTE: Pursuant to the undertaking required by paragraph (b)(10) of this section, an issuer shall furnish a copy of its annual report on Form 10-K (§ 249.310 of this chapter) to a beneficial owner of its securities upon receipt of a written request from such person. Each request must set forth a good faith representation that, as of the record date for the annual meeting of the issuer's security holders, the person making the request was a beneficial owner of securities entitled to vote at such meeting.

(11) Subject to the foregoing requirements, the report may be in any form deemed suitable by management and the information required by paragraphs (b)(5) to (b)(10) of this section may be presented in an appendix or other separate section of the report, provided that the attention of security holders is called to such presentation.

NOTE: Issuers are encouraged to utilize tables, schedules, charts, and graphic illustrations to present financial information in an understandable manner. Any presentation of financial information must be consistent with the data in the financial statements contains in the report and, if appropriate, should refer to relevant portions of the financial statements and notes thereto.

(12) Paragraphs (b)(5) through (b)(11) of this section shall not apply to an investment company registered under the Investment Company Act of 1940. Subject to the requirements of paragraphs (b)(1) through (b)(4) of this section, the annual report to security holders of such investment company may be in any form deemed suitable by management.

(13) This paragraph (b) of this section shall not apply, however, to solicitations made on behalf of the issuer before the financial statements are available if solicitation is being made at the time in opposition to the issuer and if the issuer's proxy statement includes an undertaking in bold

face type to furnish such annual report to all persons being solicited, at least 20 days before the date of the meeting.

(c) Seven copies of the report sent to security holders pursuant to this rule shall be mailed to the Commission, solely for its information, not later than the date on which such report is first sent or given to security holders or the date on which preliminary copies of solicitation material are filed with the Commission pursuant to Rule 14a-6(a), whichever date is later. The report is not deemed to be "soliciting material" or to be "filed" with the Commission or subject to this regulation otherwise than as provided in this Rule, or to the liabilities of Section 18 of the Act, except to the extent that the issuer specifically requests that it be treated as a part of the proxy soliciting material or incorporates it in the proxy statement or other filed report by reference.

NOTE: To assist the staff, managements of issuers are requested to indicate in a letter transmitting to the Commission copies of their annual reports to shareholders or in a separate letter at or about the time the annual report is furnished to the Commission, whether the financial statements in the report reflect a change from the preceding year in any accounting principles or practices or in the method of applying any such principles or practices.

(d) If the issuer knows that securities of any class entitled to vote at a meeting with respect to which the issuer intends to solicit proxies, consents or authorization are held of record by a broker, dealer, bank or voting trustee, or their nominees, the issuer shall inquire of such record holder at least 10 days prior to the record date for the meeting of security holders (or at such later time as the rules of a national securities exchange on which the class of securities in question is listed may permit for good cause shown) whether other persons are the beneficial owners of such securities and, if so, the number of copies of the proxy and other soliciting material and, in the case of an annual meeting at which directors are to be elected, the number of

copies of the annual report to security holders, necessary to supply such material to beneficial owners. The issuer shall supply such record holder in a timely manner with additional copies in such quantities, assembled in such form and at such a place, as the record holder may reasonably request in order to address and send one copy of each to each beneficial owner of securities so held and shall, upon the request of such record holder, pay its reasonable expenses for completing the mailing of such material to security holders to whom the material is sent.

NOTE 1: If the issuer's list of security holders indicates that some of its securities are registered in the name of a clearing agency registered pursuant to Section 17A of the Act, an issuer shall make appropriate inquiry of the agency and thereafter of the participants in such agency who may hold on behalf of a beneficial owner, and shall comply with the above paragraph with respect to any such participant.

NOTE 2: The requirement for sending an annual report to security holders of record having the same address will be satisfied by sending at least one report to a holder of record at that address provided that those holders of record to whom a report is not sent agree thereto in writing. This procedure is not available to issuers, however, where banks, broker-dealers, and other persons hold securities in nominee accounts or "street names" on behalf of beneficial owners, and such persons are not relieved of any obligation to obtain or send such annual report to the beneficial owners.

NOTE 3: The attention of issuers is called to the fact that broker-dealers have an obligation pursuant to § 240.14b-1 and applicable self-regulatory requirements to obtain and forward annual reports and proxy soliciting materials to beneficial owners for whom such broker-dealers hold securities.

(e) An annual report to security holders prepared on an integrated basis pursuant to General Instruction H to Form 10-K (§ 249.310) may also be submitted in satisfaction of this rule. When filed as the annual report on Form 10-K, responses to the Items of that form are subject to section 18 of the Act notwithstanding paragraph (c).

Rule 14a-9 False or misleading statements.

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

(b) The fact that a proxy statement, form of proxy or other soliciting material has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders. No representation contrary to the foregoing shall be made.

NOTE: The following are some examples of what, depending upon particular facts and circumstances, may be misleading within the meaning of this section.

(a) Predictions as to specific future market values.

(b) Material which directly or indirectly impugns character, integrity or personal reputation, or directly or indirectly makes charges concerning improper, illegal or immoral conduct or associations, without factual foundation.

(c) Failure to so identify a proxy statement, form of proxy and other soliciting material as to clearly distinguish it from the soliciting material of any other person or persons soliciting for the same meeting or subject matter.

(d) Claims made prior to a meeting regarding the results of a solicitation.